GATWICK DETAINEES WELFARE GROUP:
BHATT MURPHY TRAINING

1. These notes have been prepared by Bhatt Murphy for the use of Gatwick Detainees Welfare Group ('GDWG') volunteers and should be read in conjunction with the draft Referral Proforma.

2. Providing legal advice in the UK is highly regulated. Persons who are not formally qualified/regulated to do so must not give legal advice. These notes are intended to be a broad overview, basic introduction and practical guide to unlawful detention. The underlying issues in many cases involve complex legal and factual issues. These notes do not constitute legal advice.

INTRODUCTION

3. GDWG volunteers regularly visit detainees, whose detention may or may not be lawful. The purpose of these notes and the draft Referral Proforma is to help volunteers to a) identify when detention may be unlawful, b) identify when a referral to a solicitor is required, and c) gather the information a solicitor would need to assess the matter.

4. The Secretary of State for the Home Department (SSHD) can detain someone in order to examine their immigration status, to facilitate administrative removal or facilitate deportation. The latter two will be the most commonly seen by GDWG volunteers in Immigration Removal Centres ('IRCs'). The Secretary of State's powers of detention arise from statute[1] and there is for most people subject to immigration control no statutory time limit on how long someone can be detained.

5. There are certain groups of people that can only be detained in very limited and prescribed circumstances and if an GDWG volunteer came across them in detention they would always need urgent legal advice:

   a) Those claiming to be British citizens.
   b) Family units with minor children and unaccompanied children.
   c) Pregnant women.

HARDIAL SINGH PRINCIPLES

6. The SSHD's powers to detain a person are limited by the four 'Hardial Singh'[2] principles, as follows:

   (i) The SSHD must intend to remove the person and can only use the power to detain for that purpose;
   (ii) The individual may only be detained for a period that is reasonable in all the circumstances;

[1] (1) The Immigration Act 1971 (IA 1971);
(2) The Immigration and Asylum Act 1999 (IAA 1999);
(3) The Nationality, Immigration and Asylum Act 2002 (NIAA 2002);
(4) The Immigration (European Economic Area) Regulations 2016 (IEEAR 2016);
(5) The UK Borders Act 2007 (UKBA 2007).

[2] *R v Governor of Durham Prison, ex-parte Hardial Singh* [1984] WLR 704 at 706D, per Woolf J and *R(I) v SSHD* [2003] INLR 196 at [46] Dyson LJ

(iii) If, before the expiry of the reasonable period, it becomes apparent that the SSHD will not be able to effect removal within that reasonable period, she should not seek to exercise the power of detention;
(iv) The SSHD should act with reasonable diligence and expedition in relation to to the steps necessary to proceed with removal.

7. In practice, GDWG volunteers will be most likely concerned with the second and third principles and a key question for them will be: is there a realistic prospect that this person will be removed from the UK within a reasonable period of time?

8. There is no definition of what a 'reasonable' period of detention is. The following factors[3] will be relevant as to gauging whether it is a 'reasonable' period in the circumstances: the length of the period of detention; the nature of the obstacles to removal; the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles; the conditions in which the detained person is being kept; the effect of detention on the detainee and their family; the risk that if they are released from detention they will abscond; and the danger that, if released, they will commit criminal offences.

9. Section 3 of the referral form lists factors that will go to this question. An initial question would be whether there are barriers, which prevent a person from being removable within a reasonable period. These are often:

a) A pending immigration claim: If someone has a pending claim, like an asylum claim, the Home Office can't remove them from the UK until it has been finally determined. This is also true for potential victims of trafficking, who need to be referred into the National Referral Mechanism (NRM) and cannot be removed from the country pending a decision on their claim. You should check whether the detainee has any outstanding immigration claim / application / submissions.
b) Ongoing Court proceedings: A detainee might be exercising their right to an in-country right of appeal, which means that they can't be removed from the country pending the outcome of the process, and/or might have a Court hearing coming up which they must be in the UK to attend.
c) No emergency travel document: In order to remove someone from the UK, they would need a travel document. This is usually a passport or an Emergency Travel Document ('ETD'). Sometimes the Home Office struggles to get an ETD from the country in question, creating a barrier to removal.
d) Nationality dispute: If the Home Office can't verify someone's identity or nationality with the country in question, this is likely to cause significant delays and create a barrier to removal. This can sometimes be the reason why an ETD can't be obtained.
e) Issue with returns process: It is very difficult to return people to certain countries as there is no returns process in place (i.e. Palestine and Syria), which creates a barrier to removal.

10. The list above is not exhaustive. The detainee may have a good sense of what is preventing their removal. In any event, it is worth looking at their Monthly Progress Report (see Section 3 / Documents) which should state the reason for detention and the current barriers to removal.

[3] Dyson LJ's judgment in *R(I)* at [48] (approved in *Lumba* (at [104]))

11. Detention is not necessarily unlawful if a barrier to removal exists. The SSHD will also have regard to counterweighing factors, such as the risk that someone might abscond or offend if they were released:[4]

    a) Risk of absconding: The Home Office will rely upon this to justify detention. Indicators of absconding risk might be: criminal convictions, particularly for failing to comply with court orders, breaching bail; illegal entry and living below the radar / evading authorities / using false documents; past non-compliance with release conditions / conditions of leave; and lack of merit in outstanding challenges.
    b) Risk of harm & offending: Again, the Home Office regularly relies on this to justify detention. The Home Office's own assessment of risk of 'harm' and reoffending is often flawed. What is important is the actual magnitude of the risk - the likelihood of it occurring and the potential gravity of the consequences. Documents which are helpful in understanding the risks are: probation OASYS reports, pre-sentence reports and judge's sentencing remarks at a criminal trial etc.
    c) Non-cooperation: The Home Office might try to say that the detainee is obstructing the removal process. This might be an issue, for example, if the detainee will not sign a document needed to obtain an ETD, or refuses to be interviewed to establish their nationality etc. However, the Home Office often says that detainees are obstructing the process, when in fact this is unfounded. Section 35 of the 2004 Act creates a criminal sanction for failing to cooperate with the SSHD's efforts to effect removal in certain circumstances, but is rarely used. A person's non-cooperation is relevant to gauging what is a 'reasonable' period but, non-cooperation in itself is not a reason to detain someone and Hardial Singh can still be breached despite non-cooperation.

12. The above listed factors are not trump cards for the SSHD. The Hardial Singh principles can still be breached even if they exist. The longer that someone is detained, the stronger the counterweighing factors would need to be to justify the detention. For example, if someone has already been detained for a year, has a pending asylum and trafficking claim, has no previous convictions and has been compliant with reporting previously, it would be more difficult for the Home Office to justify their detention on Hardial Singh principles. If however someone is appeal rights exhausted, has a violent offence in their history, has removal directions set for say 2 weeks' time and an ETD in place, it would be easier for the Home Office to justify their detention on Hardial Singh principles. Every case will be fact specific.

13. Hardial Singh factors are usually not separate from public law errors. For example, if a detainee is too mentally unwell to be detained, this may be a breach of the Adults at Risk policy (see below) and therefore a public law error; however, it will also be an important factor as to the reasonableness of the period of detention under Hardial Singh. In practice, breaches of Hardial Singh and public law errors will often overlap.

[4] *R(A) v SSHD* [2007] EWCA Civ 804 (Toulson LJ, at [45]) and *R(MH) v SSHD* [2010] EWCA Civ 1112 (Richards LJ, at [64])

PUBLIC LAW ERRORS

14. The detainee's detention may also be rendered unlawful by what are referred to in law as 'material public law errors'. These are errors made by the SSHD in the initial decision to detain or over the course of the detainee's detention which vitiate the authority to detain making the detention unlawful. The Supreme Court cases establishing this and providing guidance on what constitutes a 'public law error' are *R (Lumba) v Secretary of State for the Home Department* [2012] and *R (Kambadzi) v Secretary of State for the Home Department* [2011]. A material public law error is one which bears on and is relevant to the decision to detain.

15. In *Kambadzi*, the Court also held that compliance with the SSHD's published policy on detention is an implied limitation on the statutory powers to detain. Where the SSHD detains a person without applying, or properly applying, an aspect of her policy which goes to whether that person should be detained, detention is likely to be unlawful.

16. Public law errors therefore often arise where the SSHD has breached one of her published policies on detention. In practice, the public law errors which GDWG visitors are most likely to come across will relate to breaches of (a) the General Detention Policy; (b) the Adults at Risk Policy; (c) the Detention Rules 2001 (in particular Rule 34 and Rule 35); and (d) the modern slavery policy. These are explored in more detail below.

17. However, public law errors are not limited to breaches of the Home Office's own policies. For example, a failure to recognise that the detainee has refugee status or is a British citizen is likely to amount to a public law error material to the decision to detain and rendering the detention unlawful. As stated above, this would also be relevant to whether the *Hardial Sigh* principles have been breached and the two often overlap.

18. Although this may be more difficult for GDWG visitors to identify, a failure to review detention according to the frequency required by policy also mounts to a material public law error; and reviews of detention which take place but are flawed by material public law error do not constitute a valid authorisation for continued detention.

19. Section 3 of the referral form should help visitors identify whether a public law error which may have rendered the detention unlawful has been made (the relevant paragraphs of these notes are referenced on the referral form).[5]

(a) General detention policy

20. The legality of the detainee's detention is dependent on compliance with the general detention policy, namely Chapter 55 of the Enforcement Instructions and Guidance ('EIG'). The most recent version was published in May 2019 and can be found here.

[5] With reference to the distinction between judicial review claims (see further below) visitors should bear in mind, that if the legality of the detention is vitiated by a material public law error, the a detainee will only be entitled to nominal damages if detention can nevertheless be justified by reference to policy and the *Hardial Singh* principles.

As stated above, breaches of this policy which bear upon and are relevant to the decision to detain will often overlap with breaches of the *Hardial Singh* principles.

21. We highlight below the aspects of the policy which are most likely to be relevant for GDWG visitors:

    a) There is a presumption in favour of bail and the intention that '*wherever* possible *alternatives to detention are used'* (55.1.1, 55.3). The presumption in favour of bail also applies to criminals (55.1.2). "*There must be strong grounds for believing that a person will not comply with conditions of immigration bail for detention to be justified."* (55.3)

    b) There are particular considerations where a detainee meets the deportation criteria are met (55.1.3, see also the 'immigration matters' section above). In these cases '*substantial weight'* is to be given to the risk of further offending or harm to the public and where the crime in question is '*more serious*'. The result is that "*in cases involving these serious offences… immigration bail is likely to be appropriate only in exceptional cases*" (55.3.2)

    c) A list of factors influencing a decision to detain are listed at 55.3.1 including the timescale for removal, absconding, ties to the UK and expectations about the outcome of the case and offending risks.

    d) Every detainee must be given written reasons for their detention at the time of their initial detention and thereafter every 28 days (55.6). Detention must be reviewed at regular intervals set out at 55.8 (the detention reviews, also referred to as Monthly Progress Reports, are important documents to collate for referral to a solicitor).

(b) Adults at Risk Policy

22. The Adults at Risk policies makes provision for the detention of vulnerable adults. There are two policy documents covering this:

    a) The first is the statutory guidance entitled 'Immigration Act 2016: Guidance on adults at risk in immigration detention' (AAR SG). This guidance is made pursuant to section 59 of the 2016 Act and was last updated on 8 June 2020.

    b) The second is the caseworker guidance entitled 'Adults at risk in immigration detention' (AAR CWG). The current version of the AAR CWG was published on 6 March 2019.[6]

23. The AAR policies seek to identify individuals who are vulnerable to particular harm from detention – over and above the harm that detention would cause to anyone. Detainees can be identified as adults at risk on the basis of their own self declaration, evidence from third parties and observations from Home Office or medical staff. In practice, detainees need evidence from a professional, usually a medical professional, in order for the policy to provide meaningful protection.

[6] The two policies are designed to be consistent with each other. To the extent that there is any inconsistency the statutory guidance takes precedence (*R v LB Islington ex p Jonathan Rixon* [1996] EWHC 399 (Admin)).

Identifying adults at risk

24. The AAR SG (p.11) contains a list of 'indicators of risk' including people suffering from a mental health condition, victims of torture and victims of trafficking. Physical health conditions are also considered indicators of risk but only where they are serious (this is complex to determine but relevant factors include whether the individual takes medication, has impaired mobility or ability to care for themselves, and whether they have been hospitalised).

25. If a detainee reports being a victim of torture, a specific definition will be applied: (i.e. *"any act by which a perpetrator intentionally inflicts severe pain or suffering on a victim in a situation in which— (a) the perpetrator has control (whether mental or physical) over (b) the victim, and as a result of that control, the victim is powerless to resist."*). The AAR CWG contains more information on the definition, but for the purpose of identifying detainees for referrals, a detainee claiming to have been subject to torture should be referred for legal advice urgently. If they have received a Rule 35 report (see further below) this should be attached to the referral where possible.

26. Once the detainee is identified as being 'at risk' – by virtue of them displaying one of the 'indicators of risk' – the evidence of their vulnerability is ranked from Level 1 to Level 3 to assess the likely risk of harm to the individual if detained for the period deemed necessary to effect their removal. The levels are as follows:

    Level 1: *A self-declaration (or a declaration made on behalf of an individual by a legal representative) of being an adult at risk should be afforded limited weight*

    Level 2: *Professional evidence (for example from a social worker, medical practitioner or NGO, or official documentary evidence, which indicates that the individual is (or may be) an adult at risk should be afforded greater weight. Such evidence should normally be accepted and consideration given as to how this may be impacted by detention.* The IRC medical records and any report, including reports from NGOs working with the detainee (e.g. Medical Justice) should be provided with the referral where possible and with the consent of the detainee.

    Level 3 *Professional evidence (for example from a social worker, medical practitioner or NGO) stating that the individual is at risk and that a period of detention would be likely to cause harm, for example, increase the severity of the symptoms or condition that have led to the individual being regarded as an adult at risk, should be afforded significant weight. Such evidence should normally be accepted and any detention reviewed in light of the accepted evidence.* As above, medical records and any report, including in particular Rule 35 report (see further below), should be provided with the referral where possible as they will be highly relevant to establish the legality of detention.

Weighing 'immigration factors'

27. The Adults at Risk policy states that it strengthens the general presumption against immigration detention and in favour of release on immigration bail for those who are particularly vulnerable to harm in detention.

28. The presumption can be overridden by 'immigration factors' but the AAR SG provides little guidance on how the balance should be struck.

29. Broadly, the immigration factors to be taken into account are: (i) the likely length of time in detention (i.e. when will removal happen, any barriers to removal); (ii) issues of public protection (e.g. risk of reoffending) and (iii) compliance issues and absconding risk. The AAR CW provides further guidance on how the immigration factors should be balanced against the presumption in favour of release, following the levels of risks set out above. It is important to note that the policy does not say that adults at risk should be detained or that their detention would be justified if one of the relevant immigration factors apply; it merely states that individuals would be suitable to be considered for detention, if one of these factors applies. This also means that even if one of the relevant immigration factors is applies, it may still not be appropriate to detain an individual under the policy.

30. Consideration of the immigration factors as set out in the AAR CW guidance is as follows;

a) An individual with **Level 1** evidence of risk of harm will be suitable for consideration for detention if one of the following applies
   - the date of removal can be forecast with some certainty and is within a reasonable timescale.
   - any public protection issues are identified.
   - there are indicators of non-compliance with immigration law suggesting the individuals will not be removable unless detained.

b) For an individual with **Level 2** evidence they should be considered for detention only if one of the following applies:
   - the removal date is fixed, or can be fixed quickly, and is within a reasonable timescale and the individual has failed to comply with reasonable voluntary return options.
   - they present a level of public protection concerns that would justify detention, e.g. they meet the criteria for 'foreign criminal' or there are national security concerns.
   - there are negative indicators of non-compliance which suggest that the individual is highly likely not to be removable unless detained.

c) For individuals assessed to be **Level 3** they should be considered for detention only if one of the following applies:
   - Removal has been set for a date in the immediate future and there are no barriers to removal and escorts arrangements will be in place as necessary to ensure safe removal.
   - the individual presents a significant public protection concern, or if they have been subject to a 4 year plus custodial sentence, or there is a serious relevant national security issue.

Note that if an individual with Level 3 evidence had been subject to a 4 years plus custodial sentence, they can be considered for detention, but their sentence is not in itself a reason to detain them.

In additional, the AAR CW states that non-compliance factors on their own are very unlikely to warrant detention for an AAR with Level 3 evidence.

31. Where a detainee presents with risk indicators suggesting they are an adult at risk, the visitor should include in the referral as much documentary evidence as possible, including medical records and reports. This is so that the level of evidence can be identified by the solicitor considering the referral – the higher the level of evidence, the more likely detention will be unlawful unless weighty 'immigration factors' apply. As immigration factors are relevant to the legality of the detention, it is important for the referral to also include any criminal convictions or history of non-compliance the detainee may have.

(c) The Detention Centre Rules 2001 – Rule 34 & 35

32. Detention Centre Rules (DCR) 34 and 35 are highly relevant to vulnerable adults in detention and closely connected with the AAR policies.

33. Under Rule 34 DCR every detainee should be seen by a doctor within 24 hours of initial detention. The purpose of Rule 35 DCR is to ensure that particularly vulnerable detainees are brought to the attention of those with responsibility for authorising, maintaining and reviewing detention. Rule 35 obliges doctors to inform those responsible for a detainee's detention about anyone:

    a) whose health is likely to be injuriously affected by detention (35(1));
    b) who he suspects has suicidal intentions (35(2)) and/or;
    c) who he is concerned may have been a victim of torture (35(3)).

34. Doctors normally do this by completing a 'Rule 35 report'. The reports generally follow the same template and should identify which of the subsections in Rule (1-3) apply to the detainee in question. For reports concerning victims of torture in particular, the template prompts doctors to provide details about the alleged torture, their clinical observations of any relevant physical injury and psychological symptoms and to assess whether the detainee's account is consistent with these.

35. Once a Rule 35 report has been sent to the Home Office, they must provide a response to it as soon as possible but no later than the end of the second working date after the day of receipt of it.

36. A Rule 35 report will be assessed as relevant evidence of risk of harm under the Adults at Risk Policy (p. 21 AAR CGW) as follows:

    a) A Rule 35(1) report (i.e. for a detainee whose health is likely to be injuriously affected by continued detention or any conditions of detention) will normally amount to level 3 evidence.

    b) A Rule 35(2) (i.e. for a detainee suspected of having suicidal intentions) will not always necessitate a review of the appropriateness of detention but this will depend on the information provided by the medical professionals.

    c) A Rule 35(3) (i.e. for a detained person who may have been the victim of torture) will normally amount to at least level 2 evidence. If the report states that the detainee is likely to suffer harm by continued detention, then it should amount to level 3 evidence.

37. If an GDWG visitor considers that the person they are visiting may be a vulnerable adult, they should confirm with them whether they have received a Rule 35 report, or are awaiting one, and attach any Rule 35 report with the referral. If it appears that the detainee does not have a Rule 35 report, they can be informed of their right to request a Rule 35 appointment from the detention healthcare department.

(d) The trafficking & modern slavery policy

38. The Adults at Risk policy states that the detention of individuals who have a 'positive reasonable grounds' trafficking and modern slavery decision and are waiting for a conclusive grounds decision will be considered in line with the modern slavery policy.

39. The policy sets out guidance for the processing and consideration of trafficking and modern slavery claims from individuals subject to immigration control. Government bodies and certain NGOs are known as '*first responders'* can refer individuals into the National Referral Mechanism (NRM). The Home Office is a 'first responder' itself and a failure to refer a detainee who is a suspected victim of trafficking or modern slavery to the NRM is likely to be a material public law error rendering the detention unlawful.

40. Once an individual has been referred into the NRM, Home Office Competent Authority will then decide whether there are reasonable grounds to believe that a person is a victim of trafficking or modern slavery. The decision should be taken within 5 working days, but if the person is detained it "*will be considered as soon as possible."* If there are reasonable grounds to believe that an individual is a victim of trafficking they will be given a positive reasonable grounds decision.[7] If a reasonable grounds decision is made the individual will be given a 'recovery and reflection period'. This is said to be 45 days, however conclusive grounds decisions currently take several months, if not years.

41. If a positive reasonable grounds decision has been made in respect of an individual and a conclusive grounds decision remains pending <u>they should only be detained on grounds of public order</u> (p. 86 of the guidance). If a detainee tells their visitor that they are a victim of trafficking or modern slavery, or have been referred into the NRM, they should be referred to a solicitor urgently.

42. Victims of trafficking or modern slavery who are not waiting to be referred into or for a decision from the NRM will be dealt with under the Adults at Risk policy. Those whose claim has been rejected are likely to be treated as having Level 1 evidence and those whose claim has been accepted will likely fall under Level 2 or 3 evidence.

DETENTION OF PREGNANT WOMEN

43. If a visitor is visiting a woman whom they know or suspect is pregnant, they should treat any referral to solicitors as urgent. Pregnant women, as stated above should only be detained in very limited circumstances and for short and determined periods of time.

[7] The threshold for this is relatively low as caseworker need to be satisfied of the following statement: "'*I suspect but cannot prove' the person is a victim of human trafficking*…" (p.47 of the guidance).

44. Section 60 of the Immigration Act 2016 provides that pregnant women should not be detained unless:

a) The woman will shortly be removed from the United Kingdom; or
b) There are exceptional circumstances which justify the detention.

45. In most cases, pregnant women may **not** be detained for more than 72 hours from the relevant time. This time runs from the later of when the pregnant woman is first detained or when the SSHD became aware that she is pregnant. A Minister can in certain circumstances extend this period to 7 days.

46. The Act also provides that when deciding to detain a person, the officer authorising detention must have regard for the woman's welfare.

47. Beyond the description of the statutory scheme for the detention of pregnant women a specific policy also applies to the detention of pregnant women.

48. We highlight points of the policy particularly relevant to visitors below:

a) A woman will only be considered pregnant if the Secretary of State is satisfied that that is the case. This can be through, for example, a pregnancy test by the detention centre healthcare, documentary evidence e.g. a maternity record or where it's physically apparent (p.6).

b) The duty to have regard to a pregnant woman's welfare covers not only her general welfare but also particular welfare issues that may arise as a direct result of her pregnancy (p.5). Examples of specific welfare considerations are:
- the stage of the pregnancy
- whether it is a complex pregnancy
- whether any special care or treatment is being provided or needed
- any known appointments for scans, care or treatment
- whether specific arrangements may be needed to facilitate safe removal.

49. As already stated, if a visitor comes across a detainee who is pregnant, they should be referred to a solicitor urgently, regardless of how long they have been detained for.

JUDICIAL REVIEW / CIVIL CLAIMS

50. If someone is currently detained, there are two ways to try to secure their release:

a) Bail; and/or
b) Judicial Review

Bail

51. The bail regime (and bail accommodation) is outside the scope of this training. However for the sake of completeness some basic information about bail is set out below.

52. Schedule 10 of the Immigration Act 2016 replaces all the old release mechanisms and replaces them with a new concept of "immigration bail". Bail can be granted by the SSHD or by the First Tier Tribunal (FTT). The FTT may grant bail to people

detained under the same powers (paras 3(a) to 3 (d) respectively). The SSHD may grant bail to a person detained under following provisions:

a) paras 16 (1), (1A) or (2) (but not 1B) Schedule 2 Immigration Act 1971 (detention of persons liable to examination or removal) (para 1(a));
b) para 2 Schedule 3 Immigration Act 1971 (detention pending deportation) (para 1 (b));
c) s.62 NIAA 2002 (detention for examination or removal) (para 1 (c));
d) s.36 (1) UKBA 2007 (detention pending deportation) (para 1 (d)).

53. Bail must be subject to at least one of the following conditions:

a) Appearing (one-off) before the SSHD or the FTT at a specified time and place;
b) restricting the person's work, occupation or studies in the United Kingdom
c) Address / residence;
d) Reporting;
e) Electronic monitoring (tag);
f) Such other conditions as the person granting the immigration bail thinks fit (i.e. curfew); and/or
g) Financial.

54. The FTT guidance reminds Judges that they "must always assess and impose the minimum conditions needed because to do more would be to act disproportionately" as "any bail condition is a restriction of liberty". Judges should also ensure that any condition imposed does not conflict with any other condition the person is subject to, for example those of a criminal licence.

55. When considering whether the grant bail, the SSHD and/or FTT should have regard to:

a) the likelihood of the person failing to comply with the bail condition;
b) whether the person has been convicted of an offence;
c) whether the person has been convicted of an offence;
d) the likelihood of the person's presence in the UK, while on immigration bail, causing a danger to the public health or being a threat to the maintenance of public order;
e) whether the person's detention is necessary in that person's interests or for the protection of any other person; and
f) such other matters as the SSHD or the FTT thinks relevant (i.e. Adults at Risk policy; barriers to removal; length of detention to date etc.).

Judicial Review

56. A detainee can also seek their release by challenging the legality of their detention by way of Judicial Review. A Judicial Review is the process by which a judge reviews the lawfulness of a decision or action made by a public body. In an immigration detention Judicial Review, you are challenging the legality of the SSHD's decision to detain.

57. A Judicial Review should be issued at Court as soon as possible and within three months less one day of the decision in question. When someone is currently detained, the decision to detain is ongoing, so a Judicial Review can usually be

issued at any point during the detention. Most immigration detention cases will be brought against the Secretary of State for the Home Department exclusively. However, there will be cases in which it may be appropriate to identify an additional defendant or interested party (i.e. healthcare provider or Probation Service etc). Immigration detention Judicial Reviews are brought in the Administrative Court.

58. Before a Judicial Review is issued at Court, the pre-action protocol should be followed.[8] This stipulates that the Claimant should send a pre-action letter to the Defendant setting out the basis of the challenge. The Defendant usually has 14 days to respond. However, if the matter is urgent this 14 day timeframe can be abridged. Even in the most urgent cases a pre-action letter should usually be sent.

59. Given the importance of the liberty of the Claimant, pre-action correspondence is usually conducted urgently and, when the claim is issued at Court, expedition is sought. After the claim has been issued, a Judge will consider the merits of the case on the papers. If the case is arguable, it proceeds to a substantive hearing before a Judge. This process can take many months, so a Claimant can apply for release by way of interim relief. If the Claimant is released prior to the final Judicial Review hearing, their case may be transferred to the County Court for damages to be determined (if compensation has been sought).

60. You can seek various 'remedies' by way of Judicial Review. When the claimant starts a claim he/she must state in section 7 of the Claim Form what remedy he/she seeks from the Court in the event that he/she is successful. Remedies available are listed in sections 31(1) and 31(4) of the Senior Courts Act 1981 as well as CPR Part 54 and 25. The remedies most relevant for an immigration detention Judicial Review are:

    a) Interim relief. Pursuant to CPR25.2 an order for an interim remedy may be made at any time, including before proceedings are started and after judgment is given. However, an interim remedy may only be granted before proceedings begin if the matter is urgent or it is otherwise desirable in the interests of justice (CPR25.2(b)). In this context, you would be asking the Court to release someone from detention by way of interim relief because of the urgency of the situation.
    b) Mandatory order. This means that the Court directs the SSHD to release the person from detention. This is different from the SSHD being ordered to reconsider their decision to detain – with a mandatory order, the SSHD has no choice but to release.
    c) Injunction. This is an order to act in a particular way (a positive injunction) or to refrain from acting in a particular way (a negative injunction).
    d) Declaration. The Court can be asked to make a declaration that the detention is / was unlawful. A declaration does not have any coercive effect although a public body is expected to comply with the declaration.
    e) Damages. As stated above, you can ask for damages from the Administrative Court, although it is primarily a private law remedy. You would usually ask for damages in an immigration detention Judicial Review because, if you don't, and you then try to bring a civil claim for damages later, a Court could say this is an abuse of process.

[8] https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_jrv

Civil claims

61. Once the detainee has been released, a civil claim can be brought against the Home Office for unlawful detention. Again, this may arise from a successful Judicial Review where the damages aspect of the claim has been transferred from the Admin Court to the County Court. Or, it might be a freestanding civil claim where a Judicial Review wasn't pursued. The most usual causes of action in such a civil claim would be:

    a) False imprisonment; and
    b) Breaches of the Human Rights Act.

62. Other causes of action can also be pursued, depending on the circumstances (i.e. breaches of the Equality Act 2010; assault and battery; misfeasance etc.).

63. Limitation periods (i.e. deadlines) apply to civil claims. Claims must be issued at Court within the limitation period otherwise the Claimant will very likely be barred from proceeding. It is therefore extremely important that limitation periods are not missed. A claim for false imprisonment must be issued at Court within 6 years less 1 day from the first day of detention; however, if you are claiming that the person has suffered personal injury as a result of the detention, the claim must be brought within a shorter period of 3 years less 1 day. A claim for breaches of the Human Rights Act 1998 must be brought within 1 year less 1 day. A claim for breaches of the Equality Act 2010 must be brought within only 6 months less 1 day. GDWG volunteers will not be advising detainees, or people previously detained, on the merits of their civil claim or the relevant limitation period; however, it will be helpful for GDWG volunteers to be aware that there is not an unlimited period of time for people to bring a civil claim against the Home Office.

64. A Claimant can seek compensation from the Home Office for the fact of their unlawful detention. They can also seek an admission of liability, an apology and other remedies as appropriate. The amount of money that, if successful, someone would be awarded by the Court depends on the length of time that someone was detained, the features and circumstances of the detention and what losses have been incurred by the Claimant as a result of the unlawful detention (i.e. personal injury or financial loss). A civil claim can take a number of years to resolve and most cases dealt with by Bhatt Murphy settle between the parties without the need for a full trial at Court.

Bhatt Murphy
Michela Carini
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